

1 The Tribe is covered by an insurance policy issued by
2 defendant Allied and administered by defendant York. The
3 "Sovereign Nation Commercial Insurance Policy" covers many things,
4 including "all sums for which the 'Insured' shall be legally
5 obligated to pay by reason of liability imposed upon the 'Insured'
6 by law . . . for damages . . . and expenses . . . on account of
7 'personal injuries' and/or 'property damage' arising out of any
8 'occurrence' happening during the period of this policy." (Allied
9 Mot. Dismiss Ex. A (Policy at 9)).

10 Plaintiff sent defendants a formal written demand on November
11 10, 2010, which was verbally denied on the grounds of the insured's
12 sovereign immunity. On June 22, 2011, defendants denied the claim
13 in writing on the grounds that adequate warning existed and no
14 other accidents had occurred on the premises.

15 Because she believes she cannot recover from the Tribe,
16 plaintiff now seeks in this litigation to recover from its insurer
17 Allied.

18 **Standard**

19 In considering a motion to dismiss under Rule 12(b)(6), the
20 court must accept as true all material allegations in the complaint
21 as well as all reasonable inferences that may be drawn from such
22 allegations. *ISO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 n.2 (9th Cir.
23 2000). The allegations of the complaint also must be construed in
24 the light most favorable to the nonmoving party. *Shwarz v. United*
25 *States*, 234 F.3d 428, 435 (9th Cir. 2000). However, legal
26 conclusions are not entitled to the presumption of truth. *Ashcroft*
27 *v. Iqbal*, 556 U.S. 662, 679 (2009).

28 "Under the notice pleading standard of the Federal Rules,

1 plaintiffs are only required to give a 'short and plain statement'
2 of their claims in the complaint." *Paulsen v. CNF, Inc.*, 559 F.3d
3 1061, 1071 (9th Cir. 2009) (quoting *Diaz v. Int'l Longshore &*
4 *Warehouse Union, Local 13*, 474 F.3d 1202, 1205 (9th Cir. 2007)).
5 While this rule "does not require 'detailed factual allegations,' .
6 . . . it demands more than an unadorned, the-defendant-unlawfully-
7 harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Bell*
8 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, a
9 complaint "must contain sufficient factual matter . . . to state a
10 claim to relief that is plausible on its face." *Id.* "A claim has
11 facial plausibility when the plaintiff pleads factual content that
12 allows the court to draw the reasonable inference that the
13 defendant is liable for the misconduct alleged." *Id.* The
14 plausibility standard demands "more than a sheer possibility that a
15 defendant has acted unlawfully." *Id.* A pleading is insufficient
16 if it offers only labels and conclusions, a formulaic recitation of
17 the elements of a cause of action, or "naked assertions devoid of
18 further factual enhancement." *Id.* (internal punctuation omitted).

19 Neither party disputes that the policy may be considered by
20 this court in deciding the motions to dismiss. The parties also
21 agree that Nevada law applies.

22 **Analysis**

23 Plaintiff's amended complaint (#12) alleges that: (1) FTDC was
24 negligent; (2) plaintiff is entitled to recover for the injuries
25 she suffered as a result of FTDC's negligence; (3) plaintiff was a
26 third-party beneficiary of the contract between Allied and FTDC;
27 (4) Allied breached the contract when it denied plaintiff's claim;
28 and (5) York is liable to plaintiff as the third-party

1 administrator. Plaintiff asserts both breach of contract and
2 breach of the implied covenant of good faith and fair dealing.

3 A. Breach of Contract

4 Defendants argue that as a prejudgment tort claimant and
5 nonparty to the contract of insurance, plaintiff cannot pursue a
6 direct action against them.

7 In Nevada, a "plaintiff suing a defendant for an alleged tort"
8 cannot "bring an action for declaratory judgment against the
9 defendant's insurance company regarding insurance coverage before
10 obtaining a judgment against the defendant." *Knittle v.*

11 *Progressive Cas. Ins. Co.*, 908 P.2d 724, 726 (Nev. 1996).

12 Plaintiff argues *Knittle* is not controlling because she has no
13 active complaint against the tortfeasor and cannot pursue one due
14 to its claim of sovereign immunity. While *Knittle* involved a
15 plaintiff who was pursuing a case against the tortfeasor but had
16 not yet obtained judgment, that fact is not dispositive of this
17 case.

18 First, *Knittle* cited with approval the following from *Farmers*
19 *Ins. Exch. v. Dist. Court*, 862 P.2d 944 (Col. 1993):

20 [N]o legally protected right or cognizable
21 interest [is] at stake unless and until
22 [plaintiff] has established [the defendant's]
23 liability. Her rights are contingent on her
24 successful litigation of the personal injury
25 suit. When the rights of the plaintiff are
26 contingent on the happening of some event which
27 cannot be forecast and which may never take
28 place, a court cannot provide discretionary
relief.

Importantly, the court held that a plaintiff would have a claim
against the insurer only after establishing the tortfeasor's
liability - an event that "may never take place." If true that

1 FTDC is insulated from liability by sovereign immunity, plaintiff
2 will never be able to establish her claim against FTDC. If FTDC is
3 not protected by sovereign immunity, plaintiff must pursue a claim
4 against FTDC before she can seek any relief from the insurer. In
5 either case, plaintiff's claims against the insurer cannot be
6 maintained.

7 In addition, in Nevada, third parties cannot bring bad faith
8 claims against a tortfeasor's insurance company because they have
9 no contractual relationship with the insurer - regardless of
10 whether there is a pending tort action against the tortfeasor. See
11 *Gunny v. Allstate Ins. Co.*, 830 P.2d 1335, 1336 (Nev. 1992); see
12 also *Tweet v. Webster*, 610 F. Supp. 104, 105 (D. Nev. 1985) (noting
13 that Nevada does not recognize a duty to negotiate in good faith
14 running from an insurer to a third party). Logically, then, a
15 third-party claimant also may not sue the insurer for "breach of
16 contract." In fact, an unpublished Ninth Circuit opinion broadly
17 held that in Nevada, "third-party claimants . . . who are injured
18 by an insured lack standing to sue the insured party's insurance
19 company directly." *Kinzler v. Calvert Ins. Co.*, 255 Fed. App'x
20 116, 117 (9th Cir. 2007) (unpublished disposition) (citing *Gunny*,
21 830 P.2d at 1335-36). In *Kinzler*, the plaintiff had actually
22 obtained a judgment against the tortfeasor and was seeking an order
23 requiring the tortfeasor's insurance to pay the judgment. Even
24 then, the Ninth Circuit held the plaintiff had no right under
25 Nevada law to recover against the tortfeasor's insurer.

26 Plaintiff has not cited any case in which a person was allowed
27 to directly proceed against their tortfeasor's insurer.
28 Nevertheless, she advances several unpersuasive arguments in

1 support of her claim.

2 First, plaintiff argues that public policy and common sense
3 dictate that insurance companies pay for injuries suffered by
4 victims of tribal torts. She contends that because tribes have
5 sovereign immunity, and because federal law requires tribes to have
6 liability insurance, there would be no purpose of having liability
7 insurance if the tribe's insurer was not required to pay for
8 injuries caused by the tribe, its entities or its representatives.

9 Plaintiff bases her argument on 25 U.S.C. § 450f(c), which is
10 part of the Indian Self-Determination and Education Assistance Act
11 ("ISDEAA"). The ISDEAA allows tribes to take over some of the
12 federal government's trust duties to them, such as law enforcement,
13 health services, and schooling. (Doc. #35 (Allied Reply Ex. A
14 (Cohen's Handbook of Federal Indian Law, § 22.02[1], at 1386-87
15 (2012 ed.)))). To do so, the tribes enter into "self-determination
16 contracts," which are defined as contracts, grants, or cooperative
17 agreements "between a tribal organization and the appropriate
18 Secretary for the planning, conduct and administration of programs
19 and services which are otherwise provided to Indian tribes and
20 their members pursuant to Federal law." 25 U.S.C. § 450b(j).
21 Section 450f(c) requires the government to purchase liability
22 insurance for all activities of tribes carrying out self-
23 determination contracts. This provision applies *only* to activities
24 carried out as part of a self-determination contract. *Id.* §
25 450f(c) ("[T]he Secretary shall be responsible for obtaining or
26 providing liability insurance or equivalent coverage, on the most
27 cost-effective basis, for Indian tribes, tribal organizations, and
28 tribal contractors carrying out contracts, grant agreements and

1 cooperative agreements *pursuant to this subchapter.*") (emphasis
2 added) (subchapter refers to the ISDEAA); *see also Demontiney v.*
3 *United States*, 255 F.3d 801, 813 (9th Cir. 2001) ("Any effect of §
4 450f(c) is limited by the section to 'contracts . . . pursuant to
5 this subchapter.'). Further, the ISDEAA provides that "[n]othing
6 in this subchapter shall be construed as . . . affecting,
7 modifying, diminishing, or otherwise impairing the sovereign
8 immunity from suit enjoyed by an Indian tribe." 25 U.S.C.A. §
9 450n(1). Claims based on tribal activities taken pursuant to a
10 self-determination contract are treated as claims against the
11 United States and must be pursued under the Federal Tort Claims
12 Act. *Id.* § 450f(d); Pub. L. No. 101-512, § 314 (note to § 450f);
13 Cohen's Handbook of Federal Indian Law, § 22.02[4][a], at 1391.

14 Defendants argues that the Tribe has a number of self-
15 determination contracts and the policy covers those services as
16 well as other aspects of the Tribe's operations that do not fall
17 under the ISDEAA. Additionally, defendants assert that the
18 activities of the FTDC are not funded by self-determination
19 contracts because the government has no trust duties to provide
20 business services to the tribe. Plaintiff has not alleged that the
21 FTDC's conduct in this case is pursuant to a self-determination
22 contract. However, she argues that the provision has a broader
23 application. Plaintiff maintains that "legislative history" shows
24 the purpose of § 450f is to provide an avenue of civil relief for
25 injured claimants. The legislative history plaintiff cites is the
26 "Indian Tribal Tort Claims and Risk Management Act of 1998," which
27 is a note to § 450f. Pub. L. No. 105-277, § 101(e). While that
28 act clearly shows a concern for victims of tribal torts, it

1 requires only a study of the liability insurance available to
2 tribes and annual reports to Congress containing "legislative
3 recommendations that the Secretary determines to . . . otherwise
4 achieve the purpose of providing relief to persons who are injured
5 as a result of official action of a tribal government." 25 U.S.C.
6 § 450f note, § 704, Pub L. 105-277. Nothing in the note suggests
7 tribes must obtain liability coverage for all their activities.
8 The note orders only a study and no definitive relief for those
9 victims. Moreover, even if the tribe's activities in this case are
10 covered by § 450f, plaintiff's claim must be treated as one against
11 the United States and pursued under the FTCA.

12 Second, plaintiff argues that defendants improperly invoked
13 sovereign immunity under the insurance contract, and that
14 defendants should not be allowed to use such "fraudulent acts" to
15 avoid their liability to her. Plaintiff relies on *Albert H.*
16 *Wohlers v. Bartgis*, 969 P.2d 949 (Nev. 1998) for her position. She
17 seems to contend that *Wohlers* stands for the proposition that an
18 insurer may not use its own fraudulent acts to avoid liability for
19 bad faith. The "fraudulent act" plaintiff points to is defendants'
20 failure to timely obtain written approval from the Tribe before
21 invoking sovereign immunity as required by the insurance contract.
22 Plaintiff lacks standing to enforce the parties' contract because
23 she is not a party to it, nor is she (as will be seen shortly) an
24 insured or a specific intended beneficiary of the policy.
25 Moreover, defendants' alleged failure to strictly comply with
26 notification processes of their contract does not amount to a
27 fraudulent act.

28 Finally, plaintiff argues that she can pursue her claims

1 against defendants under the contract because she is either (1) a
2 named insured or (2) a specific intended beneficiary of the
3 contract.

4 i. Named Insured

5 An insured may be able to sue an insurer for bad faith denial
6 of her own benefits, even if she's not the contracting party. See
7 *Bergerud v. Progressive Cas. Ins.*, 453 F. Supp. 2d 1241, 1249 (D.
8 Nev. 2006) (Pro, J.).

9 The policy here defines insured to include:

10 Any official, executive officer or director,
11 trustee, member, partner, employee, intern or
12 volunteer of the Named Insured while acting
13 within the scope of his or her duties as such,
14 and any person, organization, trustee or estate
15 to whom the Named Insured is obligated by
16 virtue of a written contract or oral agreement
17 to provide insurance such as is afforded by
18 this policy, but only in respect to liability
for "personal injuries" or "property damage"
caused, in whole or in part, by the Named
Insured's acts or omissions or the acts or
omissions of those acting on the Named
Insured's behalf, in the performance of the
Named Insured's ongoing operations or in
connection with premises owned by or rented to
the Named Insured.

19 (Allied Mot. Dismiss Ex. A (Policy at 8)).

20 Plaintiff argues that she is a person to whom the Tribe must
21 provide insurance under a "written contract." The "written
22 contract" she refers to is the "Indian Self-Determination
23 Contract." As previously discussed, there has been no showing that
24 any such contract exists that covers the tribe's activities in this
25 case.

26 ii. Specific Intended Beneficiary

27 "Whether an individual is an intended third-party beneficiary
28 . . . depends on the parties' intent, 'gleaned from reading the

1 contract as a whole in light of the circumstances under which it
2 was entered." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 P.3d
3 599, 605 (Nev. 2005); see also *Robert Dillon Framing, Inc. v.*
4 *Canyon Villas Apartment Corp.*, 2013 WL 3984885 (Nev. Apr. 17, 2013)
5 (unpublished disposition) ("An intended third-party beneficiary
6 must show that the parties to the contract clearly intended to
7 benefit him. . . . Third-party beneficiary status requires more
8 than the receipt of incidental benefits.").

9 Plaintiff has alleged no facts and has pointed to nothing in
10 the contract itself showing that it was the parties' intent that
11 victims of the insured be specific intended beneficiaries under the
12 contract. Rather, she argues that she is a specific intended
13 beneficiary because federal law requires tribes to have general
14 liability insurance. For the reasons already discussed, that
15 argument is without merit. The ISDEAA does not apply in this case.
16 Plaintiff has not identified any other federal law requiring tribes
17 to obtain general liability insurance for all their activities, or
18 - more importantly - requiring those insurance companies to cover
19 all claims based on those activities regardless of the Tribe's
20 underlying sovereign immunity. Thus, plaintiff is not a specific
21 intended beneficiary of the contract and is, at most, an
22 "incidental beneficiary," because the Tribe, "like all parties
23 purchasing [general liability insurance] coverage did so to protect
24 itself against potential liability, rather than with any specific
25 intent to benefit an unknown class of individuals that it might
26 injure in the future." *Kinzler*, 255 Fed. App'x at 117. Incidental
27 beneficiaries may not proceed directly against insurance companies
28 for breach of contract or bad faith. *United Fire Ins. Co. v.*

1 *McClelland*, 780 P.2d 193, 197-98 (Nev. 1989). Accordingly,
2 plaintiff's breach of contract claim against both Allied and York
3 should be dismissed.

4 B. Breach of the Covenant of Good Faith and Fair Dealing

5 In Nevada, "liability for bad faith is strictly tied to the
6 implied-in-law covenant of good faith and fair dealing arising out
7 of an underlying contractual relationship. When no contractual
8 relationship exists, no recovery for bad faith is allowed."
9 *McClelland*, 780 P.2d at 197. As discussed above, third parties
10 cannot bring bad faith claims against a tortfeasor's insurance
11 company because they have no contractual relationship with the
12 insurer. *Gunny*, 830 P.2d at 1336; *Tweet*, 610 F. Supp. at 105.
13 While a plaintiff might be able to sue an insurer for bad faith
14 denial of her own benefits if she is an insured or specific
15 intended beneficiary of the policy, *Bergerud*, 453 F. Supp. 2d at
16 1249; *Vignola v. Gilman*, 804 F. Supp. 2d 1072, 1076 (D. Nev. 2011)
17 (Pro, J.), plaintiff is neither. While a third party might be able
18 to assert a bad faith claim against the tortfeasor's insurer where
19 it "relied to its detriment on actions or representations made by
20 the insurer," *Vignola*, 804 F. Supp. 2d at 1076, plaintiff has
21 alleged no facts - in her complaint or her opposition - indicating
22 she relied to her detriment on actions or representations of the
23 defendants. She argues only that she *subconsciously* relied on the
24 gas station having liability insurance. Accordingly, plaintiff has
25 not established any basis for allowing her to proceed against the
26 defendants on the theory of bad faith.

27 **II. Amendment**

28 Plaintiff seeks leave to amend her complaint if the motion to

1 dismiss is granted.

2 Under Federal Rule of Civil Procedure 15(a)(2), "the court
3 should freely give leave [to amend] when justice so requires."
4 However, leave to amend is not to be granted automatically." *In re*
5 *W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 738
6 (9th Cir. 2013). The court "considers the following five factors
7 to assess whether to grant leave to amend: (1) bad faith, (2) undue
8 delay, (3) prejudice to the opposing party, (4) futility of
9 amendment; and (5) whether plaintiff has previously amended his
10 complaint." *Id.* (internal punctuation omitted).


11 The court concludes that any such amendment would be futile.
12 Accordingly, plaintiff's request for leave to amend her complaint
13 is denied..

14 **Conclusion**

15 Because the plaintiff has not obtained a judgment against
16 FTDC, she is not a named insured or specific intended beneficiary
17 of the contract, and she has not alleged any acts or
18 representations of the insurer that caused her to act in reliance
19 on them, the defendants' motions to dismiss (#15, #22) are **GRANTED**.
20 Plaintiff's request for leave to amend is **DENIED**, and this action
21 is hereby **DISMISSED**. The clerk of the court shall enter judgment
22 accordingly.

23 IT IS SO ORDERED.

24 DATED: This 18th day of April, 2014.

25 

26 UNITED STATES DISTRICT JUDGE
27
28